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Constitutional Provisions

Jurisdictional Statement

This appeal is one involving the question of whether the trial court must stay proceedings and sustain a motion to compel arbitration if a party invokes an arbitration clause after commencing litigation. This Court has jurisdiction pursuant to R.S.Mo § 435.440[1] and 9 U.S.C.A. 16(a)(1)(B)[2], which allow an appeal from an order denying a motion to compel arbitration. On June 16, 2002 the Circuit Court of Jackson County, Missouri overruled Appellant Triarch Industries, Inc.'s motion to compel arbitration.[3] This appeal presents none of the issues committed to the exclusive jurisdiction of the Supreme Court, and hence is properly before this Court. Mo. Const. Art. V, § 3.

Statement of Facts

Appellant Triarch Industries, Inc. is a corporation with its principal place of business in Houston, Texas. Respondent Paul Crabtree is an individual residing and doing business as Crabtree Painting in Kansas City, Missouri.[4] Appellant filed its original Petition August 7, 2001 in the Circuit Court of Jackson County, Missouri, seeking recovery of damages of $4,481.66 from Respondent pursuant to

[1] Appendix ("A"), page 8.

[2] A9.

[3] A6-A7.

[4] Legal File ("L.F.") 30-32.

on an open account.[5] Respondent was served with adequate notice of process on August 28, 2001.[6] Respondent filed its Answer to the Petition October 18, 2001.[7]

The Court continued the docketing of the case at the parties' request several times to allow an opportunity to resolve the dispute.[8] Appellant did not serve any discovery on Respondent. In fact, the only discovery conducted by either party was Respondent's Requests for Admissions lodged upon Appellant on or about April 2, 2002.[9] Approximately three weeks later, and less than one month before the May 1, 2002 trial setting, on or about April 22, 2002, Respondent requested and obtained leave to file its Counterclaim for $26,619.02 in alleged damages.[10]

Thereafter, on May 4, 2002, Appellant filed a Motion to Compel Arbitration of the parties' disputes pursuant to a clause contained within a "Qualified Applicator Agreement," with attached Conditions of Sale (hereinafter referred to as the "Agreement").[11]

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[5] L.F. 1

[6] L.F. 9.

[7] L.F. 11.

[8] L.F. 50-51.

[9] L.F. 19.

[10] L.F. 13.

[11] L.F. 26, A1-A5.

The parties each submitted Suggestions in support of their respective positions, and on June 17, 2002 after hearing arguments from counsel, the trial court overruled Appellant's Motion to Compel Arbitration.[12] Appellant filed its Notice of Appeal as to that decision on June 27, 2002.[13]

Points Relied On

1. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO COMPEL ARBITRATION, BECAUSE APPELLANT WAS ENTITLED TO THE RELEF REQUESTED PURSUANT TO THE FEDERAL ARBITRATION ACT 9 U.S.C § 2, REQUIRING THE COURT TO ENFORCE A WRITTEN AGREEMENT TO ARBITRATE LATER DISPUTES ABOUT CONTRACTS INVOLVING COMMERCE, IN THAT RESPONDENT AGREED TO THE TERMS OF AN ARBITRATION CLAUSE.

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[12] It appears that although the Circuit Court recorded the hearing at which it overruled Appellant's Motion to Compel Arbitration, the Circuit Court is unable to locate either a transcript or a recording of that hearing at this time. However, Appellant believes that for purposes of this appeal, the parties stipulate that the Appellant's Motion was overruled because the Plaintiff commenced pursuit of its claim by filing an action in the Circuit Court.

[13] L.F. 52, A10.

State ex. rel Painewebber, Inc,. v. H. Voorhees, 891 S.W.2d 126, 128 (Mo. 1995).

Berhorst v. J.L. Mason of Missouri, Inc., 746 S.W.2d 659, 662 (Mo. App. E.D. 1988).

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 225-26 (1987).

Federal Arbitration Act, 9 U.S.C. § 2 (1999).

Argument

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO COMPEL ARBITRATION, BECAUSE APPELLANT WAS ENTITLED TO THE RELEF REQUESTED PURSUANT TO THE FEDERAL ARBITRATION ACT 9 U.S.C § 2, REQUIRING THE COURT TO ENFORCE A WRITTEN AGREEMENT TO ARBITRATE LATER DISPUTES ABOUT CONTRACTS INVOLVING COMMERCE, IN THAT RESPONDENT AGREED TO THE TERMS OF AN ARBITRATION CLAUSE.

Standard of Review

"In reviewing whether a motion to stay proceedings pending arbitration is appropriate, the standard of review is essentially de novo, though '[c]ourts favor and encourage arbitration proceedings.'...However, the determination of whether a party has waived its right to arbitrate is reviewed de novo."[14]

Federal law requires that a written agreement to arbitrate must be enforced if later disputes arise under the contract involving commerce.[15] The agreement

[14] *Getz V. Watts*, 71 S.W.3d 224, 227-28 (Mo. App. W.D. 2002)(*quoting Metro Demolition and Excavation Co. v. H.B.D. Contracting, Inc.*, 37 S.W.3d 843, 846 (Mo.App.2001)).

[15] *State ex rel. Painewebber, Inc. v. H. Voorhees*, 891 S.W.2d 126, 128 (Mo. 1995). *In Re Koch Industries, Inc.*, 49 S.W.3d 439, 444 (Tex. App. 2001).

requiring the parties herein to arbitrate this controversy is enforceable pursuant to the Federal Arbitration Act, which provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[16]

As stated above, the parties are citizens of separate states.[17] Respondent accepted goods (paint) delivered to him on an open account in both Texas and Missouri, all at Respondent's specific request.[18] It is well settled that the sale of goods between citizens of different states affects interstate commerce.[19]

Therefore, the Agreement is a written, binding contract, entered into and executed by a citizen of one state and a corporation of another, the terms of which directly affect the sale of goods across state lines, and thus interstate commerce, and wherein the parties agreed that in the event of "[a]ny controversy or claim arising out of this contract or the breach thereof...(s)eller [Appellant] shall have

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[16] *Federal Arbitration Act*, 9 U.S.C. § 2 (1999).

[17] L.F. 27.

[18] L.F. 27.

[19] *Welton v. State of Missouri*, 91 U.S. 275, 280 (1875).

the right to refer the dispute to binding arbitration under rules of its choice..."[20] As a matter of law, the Agreement herein (and thus the arbitration clause contained therein), falls within the provisions of the Federal Arbitration Act, requiring the Jackson County, Missouri Circuit Court to enforce the arbitration clause in the Agreement.[21]

It is also imperative to reflect upon the strongly recognized policy generally favoring arbitration.[22] The United States Supreme Court held "the [Federal Arbitration] Act was intended to reverse centuries of hostility to arbitration agreements by placing arbitration agreements upon the same footing as other contracts..."[23] Thus, even though under the Federal Arbitration Act, the right to arbitrate can be waived,[24] in order to prove waiver, the "party seeking to establish waiver of a right to arbitrate must demonstrate that the alleged waiving party: (1) had knowledge of the existing right to arbitrate; (2) acted inconsistent with that existing right; and (3) prejudiced the party opposing arbitration by such

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[20] *See* Qualified Applicator Agreement, Conditions of Sale, Para. *10*. (L.F. 32, A1).

[21] *Federal Arbitration Act*, 9 U.S.C. § 2 (1999).

[22] *Getz v. Watts*, 71 S.W.3d 224, 229 (Mo. App. W.D. 2002).

[23] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987).

[24] *Berhorst v. J.L. Mason of Missouri, Inc.*, 764 S.W.2d 659, 662-3 (Mo. App. E.D. 1988).

inconsistent acts."[25] In addition to the strong *preference* for arbitration, "'*as a matter of federal law*, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.''[26] The weight of authority in favor of arbitration is overwhelming.

Also preemptively addressing the issue now, Appellant herein maintains that as a matter of law, it has not waived its right to arbitrate simply because it first commenced and participated in state court proceedings against Respondent. Both the Federal and State Courts of Missouri have held that the right to arbitrate has not been waived even after litigation was commenced.[27] In *Brookfield*, this Court enforced an order to compel arbitration even after a lawsuit had been litigated for 15 months prior to the party seeking to invoke its right to arbitration because there was no litigation procedures or production of any discovery.[28]

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[25] *Id*. *Brookfield v. Tognascioli et al.*, 845 S.W.2d 103, 106 (Mo. App. W.D. 1993).

[26] *Getz c. Watts*, 71 S.W.3d 224, 227-28 (Mo. App. W.D. 2002) (emphasis added) (*quoting Moses H. Cone Memorial Hosp. V. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)); see, Berhorst, 662.

[27] *Brookfield v. Tognascioli et al.*, 845 S.W.2d 103, 106 (Mo. App. W.D. 1993).

[28] *Id.* at 106. *See also, McCarney v. Nearing*, 866 S.W.2d 881, 890 (Mo. App. W.D. 1993)(trial court directed to enter an order compelling arbitration even after

Furthermore, in a 1991 8th Circuit case, the court held that a party had not waived its right to arbitrate even after not asserting arbitration as an affirmative defense in its reply to an amended counterclaim and even after the parties had engaged in written discovery.[29] In *Freeman*, the Court found and held that a party, knowing of its right to compel arbitration prior to initiating litigation and participation in discovery on arbitrable claims, acted inconsistently to its subsequent demand to compel arbitration, but nonetheless did not prejudice the other party. The court reasoned:

> Whether inconsistent actions constitute prejudice is determined on a case-by-case basis. Prejudice may result from lost evidence, duplication of efforts, use of discovery methods unavailable in arbitration, or litigation of substantial issues going to the merits . . .. **Delay in seeking to compel arbitration does not itself constitute prejudice** . . .. Although [a party] invoked the judicial process and there was some pretrial litigation activity, primarily pleadings and discovery, no issues were litigated and the limited

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the party filed a mechanic's lien and later filed a lawsuit without alleging in its petition that arbitration would be sought).

[29] *Stifel, Nicolaus & Company, Inc. v. Freeman*, 924 F.2d 157, 158 (8th Cir. 1991),

> discovery conducted will be usable in arbitration. In our view, the fact that [the party] initiated litigation to recover debit balances and waited three months after [the other parties] filed their amended counterclaims . . . before moving to compel arbitration did not prejudice [the other parties].[30]

There is absolutely no showing that Appellant prejudiced Respondent such that it waived its right to arbitration. Applying the factors in ***Freeman***, there is no lost evidence, no duplication of efforts, no use of discovery methods unavailable in arbitration, and there has been no litigation of substantial issues going to the merits of this case. Thus, pursuant to the test set forth in Brookfield, Appellant's actions inconsistent with its known and existing right to arbitration with Respondent did not prejudice Respondent so as to result in denial of Appellant's subsequent demand to initiate arbitration.

[30] *Id*. at 159 (citations omitted)(emphasis added).

Conclusion

The Federal Arbitration Act mandates that a written agreement to arbitrate be enforced if later disputes arise under the contract involving commerce. The Agreement between the parties contains an enforceable arbitration clause, whose application Appellant seeks to compel. Appellant did not prejudice Respondent by demanding arbitration after initiating and participating in limited discovery in state court proceedings so as to act as a waiver of its right to arbitration. Further, even the court may find a party waived its right to arbitrate in certain situations, any doubts concerning waiver should be resolved in favor of arbitration. Because there is an enforceable agreement to arbitrate and because there has been no waiver, the trial court erred in overruling Appellant's Motion to Compel Arbitration. For the foregoing reasons, Appellant respectfully submits that this Court should reverse the order of the trial court and remand with instructions to stay the proceedings and compel arbitration.

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Rule 84.06(c) that this brief complies with the limitations in Rule 84.06(b), and that the number of words in this brief, as counted pursuant to Rule 84.06(b) by the word processing system used to prepare the brief, is 2,133. I further certify in accordance with Rule 84.06(g) that the floppy disk submitted with this brief has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellant and a floppy disk containing a copy of the same were mailed by U.S. Mail, postage prepaid, this 23rd day of June, 2003, to:

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APPENDIX

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